UNITED STATES OF AMERJCA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

ABF FREIGHT SYSTEMS, INC.

and

Cases 09-CA-208379
09-CA-210267

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT), LOCAL 957

COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Counsel for the General Counsel takes exceptions to Administrative Law Judge Keltner W. Locke's August 20, 2018 decision in the above matter. Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel hereby submits the following Exceptions to the Administrative Law Judge's Decision:

1. To the failure to find that Respondent, ABF Freight Systems, Inc., unlawfully made a unilateral change by installing cameras in the break room/locker room areas of its facility. (ALJD 2, Appendix A, pp. 1, 3-6) [1]/ This conclusion is contrary to record evidence and controlling law.

2. To the failure to order Respondent to provide the information that was found to have been unlawfully not provided. (ALJD pp. 2-3) This is contrary to the Act's remedial purpose, public policy, and controlling law.

[1]/ References to the Administrative Law Judge's Decision will be designated as (ALJD __); references to the trial transcript will be designated as (Tr. __); references to the General Counsel's exhibits will be designated as (G.C. Ex. __); and, references to Respondent's exhibits and the Union's exhibits are designated as (R. __) and (U. __), respectively.

3. To the failure to order Respondent to cease from interfering with employees in the exercise of rights guaranteed them by Section 7 of the Act. (ALJD pp. 2-3) This is contrary to controlling law.

ARGUMENT IN SUPPORT OF EXCEPTIONS

I. Contrary to record evidence and controlling law, the Administrative Law Judge erroneously failed to find that Respondent unlawfully made a unilateral change by installing cameras in the break room/locker room areas of its facility

The General Counsel's complaint alleged, and the record evidence established, that Respondent unlawfully made a unilateral change by installing cameras in the break room/locker room areas of its facility. The record evidence established that Respondent and the General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees and International Brotherhood of Teamsters (IBT), Local 957 (the Union) are parties to a collective-bargaining agreement, the National Master Freight Agreement, that covers the facility and employees in question. (Tr. 22-23, G.C. Ex. 2) The collective-bargaining agreement, in Article 26, provides that Respondent "shall not install or use video cameras in areas of [Respondent's] premises that violate the employee's right to privacy such as in bathrooms or places where employees change clothing or provide drug or alcohol testing specimens." (G.C. Ex. 2)

On September 19, 2017, the Union learned that Respondent had installed video cameras in Shack B of its facility. (Tr. 49, 139) On September 20, 2017, Respondent installed additional cameras in Shacks A and C of its facility. (Tr. 50, 139) It is undisputed that Respondent never used cameras in these areas before. (Tr. 121-122, 224) It is also undisputed that Respondent

installed the cameras without first apprising the Union that it had done so. (Tr. 51, 131-172, 225, 255, 313)

The record evidence established that the shacks, particularly Shacks A and B, are changing facilities that include lockers along the walls, and in the middle of an entire side of the room forming several rows. (G.C. Exs. 4, 5; Tr. 27-41) On the other side of the room is a break room area. (G.C. Exs. 4, 5; Tr. 30) The cameras were installed in the middle of the room, where Respondent can view the locker area. (G.C. Ex. 5; Tr. 38-39) There are no windows in the locker side of the room, and credible record evidence established that employees use the locker room area to change. (G.C. Exs. 4, 5; Tr. 37-38, 40-43, 65-66, 133-134, 229, 265) There is no other changing room at the facility. (Tr. 44, 133) The record evidence established that employees work outside on the deck in varied conditions and may need to change in and out of clothes depending on weather, and use the locker room areas of the shacks to change out of work clothes at the end of the day, including full clothing changes. (Tr. 42-43, 65-66, 133-134) Respondent was aware that these are areas in which employees change clothes, as Dan Webb and other employees have told Respondent's representatives, including the terminal manager, as much. (Tr. 63-64, 83) While there are no other locker rooms separated by gender, the contract language stating that cameras will not be installed in changing areas does not specify that they be single sex changing areas for the language to apply, and the reality of this workplace is that the vast majority of those who use these shacks are men, and that this is the best and only changing area available to them. (Tr. 121)

Testimony from former employee and current Union Secretary/Treasurer and Business Agent Dan Webb and employee Tony Jackson established that Respondent attempted to put

cameras in the shacks in the past, in about 2013, but upon being confronted about it by the Union, relented to the Union's position and did not finish installing the cameras. (Tr. 49, 122)

Upon the unilateral installation of the cameras, the Union, both verbally and in writing, including by phone on September 19, 2017, by letter on September 23, 2017, and several times since, requested that Respondent remove the cameras and bargain about their installation, and Respondent declined to do so. (G.C. Exs. 7, 8, 9; Tr. 49-64) The Union filed a grievance regarding the unilateral change, which is still pending. (G.C. Ex. 7; Tr. 52-54) To date, Respondent has refused to negotiate about the unilateral implementation and to remove the cameras. (G.C. Ex. 9; Tr. 312) Indeed, Respondent presented the unilateral change as a fait accompli, saying "Fort Smith" said the cameras would be installed and that was that. (Tr. 124)

The Judge erred in failing to find that by installing these cameras in the break rooms/locker rooms, Respondent violated Section 8(a)(1) and (5) of the Act. Unilateral actions by an employer that modify terms or conditions of employment constitute a per se violation of Section 8(a)(5) and allow an inference of subjective bad faith. *NLRB v Katz*, 369 US 736 (1962) Employers are obligated to, at a minimum, maintain the status quo and bargain in good faith until impasse is reached, and only at the point of impasse unilaterally implement a last best offer. *Daily News of Los Angeles*, 315 NLRB 1236 (1994)

Here, although in its grievance the Union has argued, in part, that Respondent installed the cameras in violation of the collective-bargaining agreement, it has not alleged in this unfair labor practice charge that Respondent modified the contract in violation of Section 8(d), but rather that Respondent made an unlawful unilateral change. Respondent also installed the cameras in a place where they had previously never been used. Thus, the standard to determine whether Respondent violated the Act is whether the Union clearly and unmistakably waived its

right to bargain over the installation of the cameras in the break room/locker rooms, not whether Respondent had a sound arguable basis in the contract for its actions as would be the case if there was an allegation of a Section 8(d) violation under *Bath Iron Works*, 345 NLRB 399 (2005).

In *American Benefit Corp.*, 354 NLRB 1039 (2010), the Board considered a similar issue and settled on the same standard. In that case, the Board adopted the administrative law judge's conclusion that the respondent violated Section 8(a)(5) of the Act by unilaterally transferring bargaining unit work to offsite temporary employees without notifying the union or providing it with an opportunity to bargain. In doing so, the Board agreed with the judge that the respondent failed to prove that the union made a clear and unmistakable waiver of its statutory right to bargain about this mandatory bargaining subject. In discussing the standard used in the case, the Board noted that the sound arguable basis standard is only used in 8(d) cases, which was not the case in *American Benefit Corp.* and is not the case here. In evaluating the case, the Board agreed with the administrative law judge that while the delineation between the two standards may have, in years past, been less than clear, at least since the Board's decision in *Bath Iron Works*, it is pellucid that the sound arguable basis standard does not apply where, as here, the General Counsel alleges a unilateral change violation of Section 8(a)(5), and not an 8(d) violation of Section 8(a)(5).

Indeed, in another case, *Verizon North, Inc.*, 352 NLRB 1022 (2008), the Board again applied a "clear and unmistakable waiver" standard to an employer's claim that contract language regarding the Family and Medical Leave Act was a defense to an 8(a)(5) unilateral change allegation. In *Verizon North Inc.*, the Board found that the employer violated Section 8(a)(5) of the Act because the union did not clearly and unmistakably relinquish its right to bargain over the disputed practice, and specifically noted that in making that finding, the Board

was not relying on the judge's incorrect citation of *Bath Iron Works Corp.* because that case involved a different theory of violation and a different legal standard.

In yet another case, *Baptist Hospital of East Tennessee*, 351 NLRB at 72 (2007), the Board again applied the clear unmistakable waiver standard to find a unilateral change unlawful, and specifically stated that while "[a]t various times during the litigation of this case, the General Counsel appeared to make the argument that the Respondent's actions 'modified' the contract, in violation of Sec. 8(a)(5) -Sec. 8(d) … the General Counsel [is] master of the complaint" and "did not clearly pursue an 8(d) contract modification theory in this case" – therefore the clear unmistakable waiver standard applied.

Here, an 8(d) violation has not been pled, and the ramifications are that the General Counsel must prove a unilateral change case, not a contract modification case, with the clear and unmistakable waiver standard. The Union did not clearly and unmistakably waive its right to bargain over the installation of the cameras. Aside from the evidence that Respondent previously relented to the Union's opposition to installing such cameras, the plain language of Article 26 Section 2 – that cameras will not be installed in places where employees change clothing - could plausibly be read to prohibit cameras anywhere that employees change clothes, which the record evidence established that they do in the locker rooms. The record evidence establishes that employees indeed change in the locker rooms, including full clothing changes, and while there are no single sex places to do that, the majority of the employees are male, and since there are no other options, they make do with what is available. The same can be said for the lack of benches. There are no other alternatives and employees make do with the facilities they have available to them. Because employees do use the locker room areas for changing, because cameras have never been used in locker room areas of this facility before, and because

the relevant standard for establishing a violation is the clear and unmistakable waiver standard, the Administrative Law Judge's reliance on any putative past practice of installing cameras is misplaced. The correct standard for establishing a violation in this case is the clear unmistakable waiver standard, and the record evidence does not establish that the Union waived its right to bargain over the installation of the cameras in the areas in question.

Given the contract language, the Employer's past acknowledgement of the inappropriateness of having cameras in the locker area by agreeing to previously remove such cameras, and the realities of the workplace wherein the locker areas are the only available place to change for a workforce that is, in the line of their work, exposed to varied weather conditions, the Administrative Law Judge erred in failing to find that Respondent violated the Act in unilaterally installing the cameras in the shacks.

II. Contrary to record the Act's remedial purpose, public policy, and controlling law, the Administrative Law Judge erroneously failed to order Respondent to provide the information that it was found to have unlawfully not provided

The Administrative Law Judge correctly concluded that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish information which the Charging Party requested, which was relevant to its performance of its duties as the exclusive bargaining representative of an appropriate unit of Respondent's employees, and which was necessary for that purpose. (ALJD p. 2, Appendix p. 3) Having so found, in the Remedy section of his conclusion, the Administrative Law Judge also indicated that Respondent must therefore furnish to the Union, without further delay, the information the Union requested on about September 23, 2017. (ALJD p. 2) However, in his Order, the Administrative Law Judge failed to order Respondent to provide such information. (ALJD pp. 2-3) An Order requiring the production of information unlawfully withheld is a standard remedy in cases such as this one. See, e.g., *United*

States Postal Service, 337 NLRB 820, 824-825 (2000) (finding an unlawful refusal to furnish information and including an order requiring that respondent furnish that information). Thus, the Administrative Law Judge's Order should be amended to include an Order for Respondent to take the affirmative action of providing the Union with the requested information in this case.

III. Contrary to controlling law, the Administrative Law Judge erroneously failed to require, in his Order, for Respondent to cease interfering with employees in the exercise of rights guaranteed them by Section 7 of the Act

The Administrative Law Judge correctly found that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with information it requested on September 23, 2017. (ALJD p. 2) Having so found, in the Notice to Employees that is to be posted at Respondent's facility, the Judge correctly included language stating that Respondent "WILL NOT, in any like or related manner, interfere with, restrain, or coerce [its] employees in the exercise of the rights guaranteed them by Section 7 of the Act." (ALJD Appendix B) However, in the Order section of his decision, the Judge only ordered Respondent to cease and desist from "in any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act." (ALJD p. 3) The Board's standard remedial language also includes a prohibition of Respondent's interfering with Section 7 rights. See, e.g. *United States Postal Service*, 337 NLRB 820, 824 (2000) Thus, the Administrative Law Judge's Order should be amended to prohibit Respondent from in any like or related manner *interfering with* (emphasis added), restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

CONCLUSION

Based on the record as a whole, and for the reasons referred to herein, Counsel for the General Counsel submits that these Exceptions should be sustained, and that the

Administrative Law Judge's findings be rejected or modified in conformance, including his Order and Notice to Employees.

Dated: October 1, 2018

Respectfully Submitted,

/s/ *Zuzana Murarova*

Zuzana Murarova
Counsel for the General Counsel
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

CITATION OF AUTHORITIES

CERTIFICATE OF SERVICE

October 1, 2018

I hereby certify that I served the attached Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision sending true copies thereof by electronic mail today to the following at the addresses listed below:

Mark Theodore, Attorney at Law
Proskauer Rose LLP
2049 Century Park East, Suite 3200
Los Angeles, CA 90067-3206
Email: mtheodore@proskauer.com

Proskauer Rose LLP
11 Times Sq.
New York, NY 10036-6581
Email: salonso@proskauer.com

John R. Doll
Doll, Jansen & Ford
111 W First St., Suite 1100
Dayton, OH 45402-1156
Email: jdoll@djflawfirm.com

/s/ *Zuzana Murarova*

Zuzana Murarova
Counsel for the General Counsel
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271